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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEE McPHERSON,

Defendant and Appellant.

E035405

(Super.Ct.No. INF035785)

OPINION

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre,
Judge. Affirmed.

Lewis A. Wenzell, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy
Senior Assistant Attorney General, and Robert M. Foster, Supervising Deputy Attorney
General, for Plaintiff and Respondent.

Defendant Kenneth Lee McPherson unpersuasively argues the trial court abused its discretion in refusing to dismiss two or all three prior strike conviction findings.

FACTUAL AND PROCEDURAL BACKGROUND

Around midnight on September 27, 2000, Palm Springs Police Officer Guarino was flagged down by a pedestrian. Pointing to a white Buick traveling northbound on Indian Canyon, the pedestrian told the officer that defendant had taken his car. Officer Guarino radioed in a possible stolen vehicle report, describing the car and its location. Palm Springs Police Officer Douglas was in the area in a marked patrol car. Almost immediately after hearing the radio report, he saw the white Buick and started following it. After trying to get defendant to pull over, the officer activated the police lights and turned on the siren. Defendant accelerated, drove through a parking lot at 45 miles per hour, drove the wrong way on a two-lane street and ran stop signs. When he finally stopped the Buick, he tried to flee on foot, but was apprehended. He had a blood alcohol level of .08 percent and told the officers he would have run even if he had not been drinking.

In bifurcated proceedings, a jury found defendant was guilty of driving recklessly while attempting to evade a police officer. (Veh. Code, § 2800.2.) The trial court found that he committed this crime while on bail in another case (Pen. Code,¹ § 12022.1), that he had sustained three prior strike convictions (§ 667, subds. (c) & (e)) and had served two prior prison terms (§ 667.5, subd. (b)). The trial court denied his motion to dismiss

¹ All further statutory references are to the Penal Code unless otherwise noted.

two or all of the prior strike conviction findings under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and sentenced him to prison for 27 years to life.

DISCUSSION

Defendant appeals, contending the sentencing court abused its discretion when it denied his motion under *Romero*. We disagree.

A sentencing court's decision whether to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Thus, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or

where the court considered impermissible factors in declining to dismiss [citation].”

(*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

“But ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. [Citation.] Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation]. Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

Denying defendant’s motion, the trial court stated: “When the three strikes law was passed, it was made very clear that the Court had discretion to strike strikes, if it was necessary. The Romero case would indicate that. But what it also said, it’s not to be used simply to avoid the consequences of the three strikes law. You have to find that a case is outside the spirit of the law to strike the strikes. [¶] In this case, since 1983, the defendant has embarked upon consistent violations of the law, one after another. We have situations where he gets out, reoffends, reoffends. [¶] The chase in this matter, it’s not as bad as some. But it was at high speeds, and it was clearly a danger to the people

that were in the area. [¶] And, yet, the defendant comes in once again and says, now I'm trying to get my life together. Since 1983, he has a record that goes right up until today that shows that he's not going to do that, that he is a danger to our society. And, sadly, it's time that he has to pay the price for that. [¶] The Court thinks this case falls squarely within the meaning and the intent of the voters in passing the 25 years to life sentence, the three strikes law. [¶] The motion to strike the strikes will be denied in this case."

The above statement of the trial court that presided over both trials shows it was aware of its discretion, it considered the relevant factors and it exercised its discretion in conformity with the spirit of the law.

Defendant argues the trial court's denial constitutes an abuse of discretion because he was 40 years of age at the time of sentencing, his current conviction and his prior strike convictions were not violent offenses, his prior strike convictions were 16 years old -- well before the passage of the "Three Strikes" law in 1994 -- he had been an alcoholic for 15 years and had abused marijuana and methamphetamine. We do not find his argument persuasive.

Although defendant was convicted of the prior strike offenses in 1987, remoteness is not a significant factor because he has not led a crime-free life since the convictions and he was out on bail when he committed the current crime. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) His criminal record shows he was convicted of a misdemeanor theft and placed on probation in 1983. In 1985, he was convicted of misdemeanor theft and granted probation. In 1987, he was convicted of petty theft with a prior and placed on probation. In 1987, he was convicted of three counts of first degree

residential burglary and sentenced to state prison. After he was released on parole, he violated parole and was returned to prison. In 1992, just months after being paroled, he again was convicted of petty theft with a prior and returned to state prison. In 1994, he was convicted in Utah of illegal possession of marijuana and fined. In 1995, he was convicted of felony grand theft and sentenced to three years in state prison. In 1999, he was convicted of falsely identifying himself to a police officer and sentenced to prison. At the time of this sentencing he had five criminal cases pending in Riverside Superior Court, including one that charged robbery and assault with a deadly weapon.

Thus, it is apparent that defendant “‘. . . had been taught, through the application of formal sanction, that [] criminal conduct was unacceptable -- but had failed or refused to learn his lesson’ [citation].” (*People v. Williams* (1998) 17 Cal.4th 148, 163.)

Consequently, as the trial court found, he cannot be deemed outside the spirit of the Three Strikes law in light of his present felony convictions, his prior serious felony convictions and the particulars of his background, character, and prospects. Hence, he may not be treated as though he had not previously been convicted of the serious felonies.

In view of the foregoing, the trial court’s ruling did not fall outside the bounds of reason under the applicable law and the relevant facts.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

McKINSTER

J.

WARD

J.